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In The

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS AND THE STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

REPLY BRIEF OF MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF STATE PETITIONERS

This case concerns two separate rules issued by EPA with respect to two different pollutants: particulate matter and ozone. The court below invalidated both rules on the basis of the "nondelegation" doctrine. A large number of respondents concede that this deviant but important constitutional ruling warrants this Court's review. (Brief in Response for Respondents American Trucking Associations, *et al.*, 10 ("ATA Resp."); Brief in Response for States of Ohio, Michigan and West Virginia 3 ("Ohio Resp.").) However, one group of respondents avers that the lower court's invalidation of EPA's rules on the basis of a constitutional doctrine not used by this Court to overturn a statute in more than six decades is so "pedestrian" that it requires "no comment, let alone Supreme Court review." (Brief in Response for Appalachian Power Co., *et al.*, 24 ("App. Pwr. Resp.").) As set forth below, however, respondents premise this audacious claim on a mistaken reading of the opinion below, and on the implicit constitutionalization of basic principles of administrative law.

The court also held that the ozone standard could not be enforced. As to the question whether this ruling comports with the Clean Air Act, all respondents urge this Court to leave matters where they stand. But the two questions that petitioners have brought before this Court concerning the ozone standard – constitutional and statutory – should be heard together. Unless this Court grants review of the statutory question whether EPA may enforce the revised ozone standard, review of the constitutional question *as it applies to the ozone rule* may amount to a pointless exercise in abstraction. To avoid this eventuality, the Court should grant review of both questions, constitutional and statutory, presented by petitioners.

1. *The constitutionality of the Clean Air Act as applied to EPA's revised rules.*

The court below held that the "statutory language" of the Clean Air Act and the "existing agency interpretation" of that language "involve an unconstitutional delegation of power." (Appendix to State Petitioners' Petition for Certiorari 12 ("App.").) Many respondents, including the State of Ohio, concede that this remarkable constitutional ruling warrants this Court's review. (ATA Resp. 10; Ohio Resp. 3.) When the United States Government and States that are parties to a case collectively request this Court's review and when, moreover, a large contingent of industry parties acquiesces in that request, such a case comes to this Court with a heavy presumption that review is warranted.

Despite their sensible concession about the importance of this case, however, Respondents ATA, *et al.*, attempt to recast the decision below as a "work-a-day" remand under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). (ATA Resp. 14.) Similarly, Respondents Appalachian Power, *et al.*, strain to fit the court's problematic constitutional decision into the familiar framework of "arbitrary and capricious" review under the Administrative Procedure Act and statutory interpretation under *Chevron* (App. Pwr. Resp. 12-13, 15.) Respondents National Stone Association, *et al.*, make a similar attempt. (Brief in Response for Respondents National Stone Association and Kennecott Holdings Corporation, *et al.*, 7-8 ("Nat'l Stone Resp.").) These efforts to domesticate the D.C. Circuit's bold ruling do not succeed.

Tellingly, none of the respondents defends the lower court's ruling that the "statutory language" of the Clean Air Act violates the nondelegation doctrine. (App. 12.) Instead, respondents seek to reassure this Court that the constitutional status of the Clean Air Act itself – which has been on the statute

books for three decades and has been the subject of numerous judicial challenges, including several in this Court – is secure. (App. Pwr. Resp. 8 ("The court did *not* hold the statute itself unconstitutional"); ATA Resp. 15 (statute "undisputedly is not" unconstitutional)). Presumably, respondents recognize that a failure to concede the constitutionality of the Clean Air Act would place their views at obvious odds with this Court's numerous precedents upholding far broader delegations against constitutional attack (discussed in our petition at 18-21). Thus, rather than acknowledging that the court below found that the "statutory language" of the Clean Air Act violated the nondelegation doctrine (App. 12), respondents repeatedly claim that the court found only that EPA's *interpretation* of the Act was unconstitutional.

But how does a statute that is "undisputedly" constitutional somehow *become* unconstitutional when interpreted by an administrative agency?

Respondents Appalachian Power, *et al.*, offer the most adventuresome answer to this question. Distancing themselves from the dubious constitutional grounding of the D.C. Circuit's opinion, these respondents implicitly equate the arbitrary and capricious standard of review with the constitutional doctrine of delegation. For example, respondents cite decisions based on the arbitrary and capricious standard as if those decisions support the D.C. Circuit's constitutional ruling. (See, e.g., App. Pwr. Resp. 17 (citing *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998).) Even more bewilderingly, respondents also suggest that the D.C. Circuit's rationale for remanding EPA's rules

> might as well have been articulated as "arbitrary and capricious" agency action – that EPA failed to state a rational basis for its decision. *Whatever the rationale*, the

> proposition that an agency's discretion must be guided by an intelligible criterion is so pedestrian as to require no comment, let alone Supreme Court review. (App. Pwr. Resp. 12-13 (footnotes omitted, emphasis added).)

See also Nat'l Stone Resp. at 7-8. Respondents' casual equation of the nondelegation doctrine with the arbitrary and capricious standard should not be countenanced.[1] Respondents'

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[1]It is possible that the respondents, in the passage cited in text, are inartfully attempting to defend the court's judgment on the basis of an argument not reached by the court below. This Court should not decide the question whether EPA's rules are arbitrary and capricious. Addressing this question would require systematic, in-depth scrutiny of the voluminous record in this case. This complex and fact-bound issue should be considered in the first instance by the appeals court. Moreover, respondents did not present this argument in this same form below, and therefore the question whether EPA's rules are arbitrary and capricious in the way respondents now allege is not properly before this Court. With respect to particulate matter, for example, respondents did not argue to the lower court that EPA's revised particulate matter rule was arbitrary and capricious due to the agency's failure to explain why it targeted one pollutant level rather than another. Rather, respondents took issue with the scientific evidence underlying the revised standard, see Brief of Non-State Petitioners on Fine Particulate Matter NAAQS, and with EPA's failure to consider the effects of the rules on small businesses, see Brief of Small Business Petitioners and Intervenor (PM Rule). Likewise, with respect to the ozone standard, respondents challenged the scientific evidence underlying EPA's finding of an unacceptable risk to human health, but did not ask the court to require EPA, in the name of arbitrary and capricious review, to set "determinate, binding standards" such as those ultimately

theory would threaten to turn every departure from the principles articulated in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), into a constitutional case. Needless to say, such a result would vastly and inappropriately enlarge courts' authority to invalidate agency action on constitutional grounds.

Respondents Appalachian Power, *et al.*, also offer a second theory as to how an "undisputedly" constitutional statute may be transmuted into an unconstitutional one in an agency's hands, and in this instance they are joined in their argument by respondents ATA, *et al.* Respondents contend that the court's ruling invalidating EPA's rules under the Clean Air Act on constitutional grounds is "functionally indistinguishable" from a "work-a-day" ruling that, according to the principles of *Chevron*, the agency simply misinterpreted the Clean Air Act. (ATA Resp. 14; *see also* App. Pwr. Resp. 13 & n. 27, 15; *cf.* Nat'l Stone Resp. 9).[2]

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required by the court (App. 12). See Brief of Non-State Clean Air Act Petitioners and Intervenors 48-53 (Ozone Rule).

[2]Although all of the respondents appear to agree that EPA misinterpreted the Clean Air Act, they do not agree as to how the agency *should* have interpreted the Act. For example, compare Nat'l Stone Resp. 9 (arguing that EPA misinterpreted Act in not quantifying risk before regulating) with App. Pwr. Cross-Pet. (arguing that EPA misinterpreted Act to preclude consideration of factors unrelated to public health effects resulting from pollution's presence in ambient air). As we discuss in our opposition to respondents' cross-petitions, respondents offer quite a varied array of different possible interpretations of the Clean Air Act in the course of arguing that the meaning of the statute is clear. *See* Brief in Opposition for Petitioners Massachusetts and New Jersey.

Nowhere did the court below suggest, however, that EPA had *misinterpreted* the Clean Air Act. Indeed, the court *upheld* EPA's longstanding interpretation of the statute to forbid the consideration of costs and feasibility in setting the NAAQS. (App. 17-20.)[3] Rather than finding that EPA's position was a misinterpretation of the Clean Air Act, the court found that the agency's interpretation, though permissible under the statute, was unconstitutional. This ruling is a world away from a ruling that EPA merely misinterpreted the statute. Here, too, therefore, respondents work hard to dismiss the constitutional significance of the court's ruling, and in doing so both misread the court's opinion and intimate that agencies that violate *Chevron*, violate the Constitution. (App. Pwr. Resp. 16 & n. 35 (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), a garden-variety statutory interpretation case, as a "'nondelegation'" case).)

Respondents' understandable desire to distance themselves from the dubious constitutional foundations of the lower court's decision cannot be squared with their argument that the constitutional status of the Act as interpreted for thirty years is so seriously in doubt that this Court should rewrite the Act in order to avoid deciding a constitutional question. (ATA Cross-Pet. I.) Respondents cannot have it both ways. An "undisputedly" constitutional statute does not require or permit invocation of the canon counseling avoidance of constitutional decisions: "The canon about avoiding constitutional decisions . . . must be used with care, for it is a closer cousin to invalidation than to interpretation. . . . Constitutional decisions breed penumbras, which multiply questions. Treating each as

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[3]In our Brief in Opposition, we explain why the Conditional Cross-Petitions on this statutory question should be denied. *See* Brief in Opposition for Petitioners Massachusetts and New Jersey.

justification to construe laws out of existence too greatly enlarges the judicial power." *United States v. Marshall*, 908 F.2d 1312, 1318 (7th Cir. 1990) (Easterbrook, J.).

2. *The enforceability of the revised ozone standard.* Respondents do not seek review of the D.C. Circuit's ruling that the Clean Air Act authorized EPA to revise the air quality standard for ozone. (App. 31-33.) Nor do they challenge the court's holding that EPA must designate areas as attainment, nonattainment, or unclassifiable under the revised standard. (App. 33-34.) Nevertheless, they argue that the court's ruling that section 181(a)(1) precludes EPA from *enforcing* the revised ozone standard is unworthy of this Court's review because the court's decision is correct and because the ruling is in an interlocutory posture. Neither of these assertions has merit.

In arguing that the language of section 181(a)(1) supports the lower court's ruling, respondents ignore most of the language of this provision. As we set forth in detail in our Petition, the language of sections 181 and 182 overwhelmingly points to the conclusion that these provisions are exclusively concerned with implementation of the former, one-hour ozone standard – the standard that existed when these sections were enacted. (Pet. 21-25.)

Respondents also never confront the absurd implications of the lower court's interpretation of section 181(a)(1). The court held that EPA may revise the ozone standard and, if it does so, it *must* designate areas according to their attainment status *under the revised standard.* (App. 33-34.) However, if section 181(a)(1) is interpreted as the court below interpreted it, then the agency must *disregard its designations under the revised standard* and *classify* areas according to the previous, one-hour ozone standard. (Pet. 23-24.) This conclusion follows from the plain language of section 181(a)(1): areas

designated nonattainment under this provision must be classified "according to the interpretation methodology issued by the Administrator most recently before the date of the enactment of the Clean Air Act Amendments of 1990." 42 U.S.C. 7511(a)(1). The interpretation methodology in effect at that time was based on the previous, one-hour ozone standard. (Pet. 23 & n. 9). Thus, if EPA must, as the court below held and as respondents claim, classify areas under the revised standard under section 181(a)(1) of the Act, and not under Subpart 1, then EPA will be forced to classify areas according to the ozone standard that it has abandoned. There is no warrant in the language, structure, or purpose of the Clean Air Act for sanctioning such an odd result.[4]

Nor does the legislative history support respondents' awkward reading of section 181(a)(1). Respondents ATA, *et al.*, claim that "Congress *specifically considered* and *rejected* bills that would have expressly limited Subpart 2's reach in just the manner EPA claims that *enacted* statute does." (ATA Resp. 23 (emphasis added and in original).) While it is true that the version of Subpart 2 contained in the original House and Senate bills referred specifically to the bills' equivalent of section 107(d)(4) rather than to 107(d) as a whole, there is nothing in

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[4]Subsequent legislation confirms our reading of the statute. In the Transportation Equity Act for the 21st Century, Congress reaffirmed the States' and EPA's obligations to designate areas under the revised ozone standard. Congress extended the States' statutory deadline for submitting designations, and shortened EPA's deadline for promulgating them. Pub. L. No. 105-178, § 6103, 112 Stat. 465 (1998). Under respondents' interpretation of the Clean Air Act, Congress, in taking this action in 1998, simply – pointlessly – reaffirmed the States' and EPA's obligations to promulgate designations that would then be completely ignored.

the legislative history to suggest that this change was meant to transform a revised ozone standard from an enforceable standard into an unenforceable one. Indeed, the failure to include the single number "(4)" in the final law – which, on respondents' reading, dramatically reworked the regulatory scheme – went unremarked in the legislative history.[5]

Respondents also argue that the question whether the revised ozone standard may be enforced is in an "interlocutory posture" because EPA must now, in light of a part of the D.C. Circuit's decision not challenged here, consider and evaluate the claim that smog is good for people. (*E.g.*, App. Pwr. Resp. 29-30.) Respondents claim that EPA must now redo the entire process of setting air quality standards, including issuing a new Criteria Document – a process that Respondents ATA, *et al.*, assert will take from "three to five years." (ATA Resp. 17.)

Even assuming that respondents are correct in claiming that EPA must now entirely redo its work on the ozone standard, and even assuming they are correct that this process will take from three to five years, this gives this Court all the more reason to grant review of the question whether the ozone standard may be enforced. For if respondents are correct, EPA must now engage in a lengthy and complex process, likely involving scores of agency personnel, in order to revise a standard that the court below has ruled cannot be enforced. This would be a colossal waste of precious resources.[6]

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[5]*See* H.R. Rep. No. 101-490, Pt. 1, at 229-232, *reprinted in* 2 1990 Legis. Hist. 3253-3256.

[6]Respondents also oppose review on the Subpart 2 issue on the ground that the lower court has "left open the door" to further proceedings with respect to Subpart 2. (ATA Resp. 20, citing the United States' appendix to its petition, at 81a.) The

Many of the parties in this case agree that the question whether EPA's revised ozone standard violates the nondelegation doctrine is worthy of this Court's review. Yet unless this Court also agrees to review the question whether this standard may be enforced, review of the constitutional question pertaining to the ozone standard may turn out to be a pointless exercise, as it may succeed only in either ratifying or undoing an agency standard that in any event may not be enforced. In this way, the constitutional and statutory questions petitioners have raised are closely connected, and this Court should review them together.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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only proceedings for which the court left open the door, however, are proceedings to reconsider the court's decision *not to vacate* the ozone standard. (U.S. App. 81a.)